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No. 79-1310

In the Supreme Court of the United States

OCTOBER TERM, 1979

RUSSELL L. LARSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-18) is reported at 612 F. 2d 1301.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1980. A petition for rehearing was denied on January 28, 1980. The petition for a writ of certiorari was filed on February 25, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in refusing to require the government to reveal the identity of a confidential informant.

2. Whether the district court correctly found that a civil audit by the Internal Revenue Service was not a subterfuge designed to mislead petitioner into cooperating with the government in a criminal investigation.

3. Whether the district court correctly found that petitioner failed to present evidence showing that he was selected for prosecution upon a constitutionally impermissible basis.

4. Whether the district court erred in imposing sentence by considering petitioner's commission of perjury at trial.

5. Whether the district court erred in withholding from petitioner the sentence recommendation contained in the presentence report.

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on three counts of willfully evading income taxes for the years 1972, 1973, and 1974, in violation of 26 U.S.C. 7201, and on three counts of subscribing to materially false corporate income tax returns for the same years, in violation of 26 U.S.C. 7206(1). The district court sentenced petitioner to concurrent two-year prison terms on each count. The court of appeals affirmed (Pet. App. A-1 to A-18).

1. Prior to trial, petitioner moved for disclosure of the identity of a confidential government informant, moved to dismiss the indictment on grounds of selective prosecution, and moved to suppress certain statements and evidence. The district court denied petitioner's motion to disclose the identity of the informant and also declined to hold an evidentiary hearing on the issue of selective

prosecution. However, the district court granted petitioner's motion for a hearing on his claim that he had been deceived into divulging certain evidence by representations of IRS agents that their investigation of his activities was wholly civil in nature.

The evidence adduced at the suppression hearing showed that in February 1975 an unidentified informant contacted the Intelligence Division of the Internal Revenue Service concerning a possible income tax evasion scheme at Polar Chevrolet, Inc. Petitioner was majority stockholder and president of that company. The Intelligence Division referred the matter to the Audit Division pursuant to customary agency procedures (Pet. App. A-3 to A-5). In September 1975, the case was assigned to Agent Gary Koosman to perform a civil audit of the 1972, 1973 and 1974 tax returns of petitioner and Polar Chevrolet. Koosman's only contact with the Intelligence Division during this period was a conversation with the special agent who had spoken with the informant concerning the substance of the informant's tip. On November 25, 1975, Koosman determined that petitioner's and Polar's tax returns were potentially fraudulent. He then referred the case to the Intelligence Division for criminal investigation. Petitioner was advised of the criminal nature of the investigation and of his *Miranda* rights on April 22, 1976 (Pet. App. A-5 to A-6).

After the suppression hearing, the district court suppressed all statements and documents obtained from petitioner after November 25, 1975 (when Agent Koosman determined the tax returns were potentially fraudulent) and before April 22, 1976 (when petitioner was informed of his *Miranda* rights) (Pet. App. A-6, A-8).

2. The evidence at trial disclosed that, beginning in 1971 and continuing through 1974, petitioner engaged in a kickback scheme along with Rodger Vogel, an advertising executive who provided services to Polar Chevrolet. Vogel submitted two invoices for advertising services rendered to Polar, one invoice reflecting the actual charge and another reflecting an inflated charge. The higher invoice was paid by Polar. Vogel then wrote a check to petitioner representing the difference between the two invoices. Petitioner received these amounts as unreported personal income and reported the false inflated charges as business expenses on Polar's corporate tax returns. During this period, petitioner also diverted to his personal use various checks made payable to Polar Chevrolet for truck leases, automotive parts repayments and refunds (Pet. App. A-4, A-6 to A-7).

The kickback and check diversion scheme resulted, during taxable years 1972 through 1974, in underreporting of Polar Chevrolet's corporate income by $57,434 and underreporting of petitioner's personal income by $44,191 (Pet. App. A-7).

ARGUMENT

1. Petitioner contends (Pet. 30-33) that he was prejudiced by the government's refusal to disclose the identity of its confidential informant. However, as both courts below correctly found (Pet. App. A-9 to A-10), the identity of the informant was not relevant to petitioner's defense at trial. Petitioner's interest in learning the identity of the informant did not outweigh the interest of the government in preserving the confidentiality of the informant's identity. See *Roviaro* v. *United States*, 353 U.S. 53, 62 (1957). See also *McCray* v. *Illinois*, 386 U.S. 300 (1967).

The informant here involved simply communicated his belief that a kickback scheme had occurred at Polar Chevrolet. Petitioner did not claim that the tipster was a participant in the crime or that he knew facts about the crime that were unknown to the defense. Under these circumstances, the identity of the informant need not be divulged. See, *e.g.*, *United States* v. *Alonzo*, 571 F. 2d 1384, 1387 (5th Cir.), cert. denied, 439 U.S. 847 (1978); *Simpson* v. *Kreiger*, 565 F. 2d 390, 391-392 (6th Cir. 1977), cert. denied, 435 U.S. 946 (1978); *United States* v. *Russ*, 362 F. 2d 843 (2d Cir.), cert. denied, 385 U.S. 923 (1966).

The crime charged against petitioner was proven by the testimony of witnesses who were known to petitioner and who were extensively cross-examined by his counsel at trial. Under these circumstances, withholding the identity of the informant could not have prejudiced petitioner, and the district court did not abuse its discretion in denying the disclosure motion.[1]

2. Petitioner also argues (Pet. 26-30) that the civil audit was a subterfuge and that a criminal investigation was being conducted by the Internal Revenue Service from the beginning. On this basis, he contends that he was misled by the investigating agents and that his statements and the documents he produced should have been suppressed.

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[1]The cases cited by petitioner do not support his contrary contention. In *United States* v. *Gocke*, 507 F. 2d 820, 826 (8th Cir. 1974), the court recognized that the identity of a mere tipster need not be divulged. In *United States* v. *Barnes*, 486 F. 2d 776 (8th Cir. 1973), in contrast, the court required disclosure of the identity of an informant who possessed material information essential to the defense.

However, as both courts below specifically found, the audit in question was a civil audit at least until November 25, 1975, when the investigating agent determined that there was a possibility of a criminal violation (Pet. App. A-11 to A-12).

Tips received from informants are initially evaluated by the Intelligence Division of the Internal Revenue Service (Suppression Hearing Tr. 174). Such tips are ordinarily transmitted to the Audit Division for a civil audit. If the civil audit discloses evidence of fraud, the case is referred back to the Intelligence Division and a criminal investigation is commenced (*id.* at 172-174). This procedure has been approved repeatedly by the lower courts. See, *e.g.*, *Truitt* v. *Lenahan*, 529 F. 2d 230 (6th Cir.), cert. denied, 427 U.S. 912 (1976); *United States* v. *Leonard*, 524 F. 2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); *United States* v. *Davis*, 424 F. 2d 1241 (5th Cir.), cert. denied, 400 U.S. 821 (1970); *United States* v. *McCorkle*, 511 F. 2d 482, 487-489 (7th Cir.), cert. denied, 423 U.S. 826 (1975); *United States* v. *Robson*, 477 F. 2d 13 (9th Cir. 1973).

Petitioner has cited nothing in the record that supports his assertion that the civil investigation was conducted in bad faith or was a subterfuge. The uncontroverted testimony of Agent Koosman revealed that he was not acting under the direction of the Intelligence Division, but rather was performing a standard audit under the supervision of the Audit Division (Suppression Hearing Tr. 82, 86-88, 109, 137, 182). As soon as Agent Koosman's investigation led him to suspect fraud, the case was turned over to the Intelligence Division (*id.* at 74-75, 97, 121). At

his first interview with the special agent from the Intelligence Division, petitioner was warned of the criminal aspect of the investigation and was notified of his *Miranda* rights (Suppression Hearing Tr. 22-23).

3. Petitioner also contends (Pet. 33-35) that the indictment should have been dismissed because the prosecution was discriminatory and was instituted only to generate publicity. This contention was properly rejected by both courts below.

Considerable discretion is vested in the government in deciding which cases to prosecute, and that discretion will be reviewed only on a prima facie showing that the prosecution is invidious or discriminatory. *Oyler* v. *Boles*, 368 U.S. 448, 456 (1962); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). Petitioner was required to show (1) that he had been singled out for prosecution when other similarly situated violators had not been prosecuted and (2) that this selection was based on impermissible considerations such as race or religion. See *Oyler* v. *Boles*, *supra*; *United States* v. *Berrios*, 501 F. 2d 1207, 1211 (2d Cir. 1974); *United States* v. *Ojala*, 544 F. 2d 940, 943 (8th Cir. 1976); *United States* v. *Swanson*, 509 F. 2d 1205, 1209 (8th Cir. 1975).

Petitioner was allowed to make an offer of proof on this question (Tr. 681-708), but he failed to make the requisite showing. No evidence was presented suggesting that other persons similarly situated were not prosecuted. Moreover, petitioner made no showing that this prosecution was instituted for publicity purposes. (We note that even if such a showing had been made, publicity and its deterrent value are not impermissible considerations in

initiating a prosecution. See *United States* v. *Oaks*, 527 F. 2d 937, 939-940 (9th Cir. 1975), cert. denied, 426 U.S. 952 (1976); *United States* v. *Gillings*, 568 F. 2d 1307, 1309 (9th Cir.), cert. denied, 436 U.S. 919 (1978); *United States* v. *Catlett*, 584 F. 2d 864, 868 (8th Cir. 1978).) Under these circumstances, there was no need for a further hearing on the issue of discriminatory prosecution.

4. Petitioner claims finally that the sentencing procedure followed by the district court was improper. First, he asserts (Pet. 22-25) that the trial judge acted improperly in taking into account his belief that petitioner perjured himself at trial. However, this consideration was approved by the Court in *United States* v. *Grayson*, 438 U.S. 41 (1978). Contrary to petitioner's contention, he was not sentenced to jail for perjury. The trial judge simply took into account the veracity of his testimony as one factor relevant to his prospects for rehabilitation. See *United States* v. *Grayson*, *supra*, 438 U.S. at 55.

Second, petitioner asserts (Pet. 25-26) that his sentence was invalid because he was not permitted to inspect the presentence recommendation of the United States Probation Service. However, Fed. R. Crim. P. 32(c)(3)(A) provides that "[b]efore imposing sentence the court shall upon request permit the defendant * * * to read the report of the presentence investigation exclusive of any recommendation as to sentence * * *." Here, the presentence report itself was disclosed to petitioner. He was thus free to contest any factual matter considered by the trial judge in sentencing. Only the recommendation as to sentence was withheld (Sentencing Hearing Tr. 2-4). The trial judge's refusal to disclose that recommendation was consistent with the express terms of Rule 32(c)(3)(A).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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